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No. 88-259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1987

ALTON PACKAGING CORPORATION,

Petitioner,

v.

POLLUTION CONTROL BOARD

and

ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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STATEMENT OF THE CASE

The statement of the case submitted by Alton Packaging Corporation ("Alton") fails to comply with Supreme Court Rule 21.1(h). Alton's statement of the case also fails to provide the Court with an accurate description of the course Alton's application followed in the permit review process.

A. Noncompliance with Supreme Court Rule 21.1(h)

Supreme Court Rule 21.1(h) required Alton to specify, in its statement of the case,

> "The stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears *** as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Alton did not inform this Court that it raised the question presented in its petition for the first time in its petition for rehearing before the Fifth District Court of Appeals ("Fifth District").

B. The permit review process

In this case, Alton submitted its application to the Illinois Environmental Protection Agency ("Agency") to renew the operating permits for Boilers 6 and 7 shortly before the Pollution Control Board ("Board") amended the regulation governing sulfur dioxide emissions from emission sources, such as those for which Alton was seeking a permit, to reduce the allowable level of emissions. In response to the amendment of this regulation, Alton filed petitions for a variance and a site-specific rule in order to obtain a higher emission level (5th District opinion, petitioner's appendix, p. c-2). In submitting its renewal application, Alton had elected to rely on the data submitted with its prior permit applications to support its pending application — data which would be relevant only in evaluating compliance with the old sulfur dioxide standard and not the new standard. Accordingly,

> "Alton waived the 90-day decision period until the Board issued a final order in PCB 83-55 (site-specific rule) and PCB 83-49 (variance)." (*Alton Packaging Corp. v. Environmental Protection Agency*, PCB 85-145 (April 24, 1986), hereafter "Board opinion," petitioner's appendix, p. e-2.)

Alton did not attempt to supplement its pending permit application with information relevant to the regulatory change or with information developed during the variance and site-specific rule proceedings.

During the waiver period the Agency continued to monitor Alton's operation of Boilers 6 and 7. In November of 1984 the Agency's ambient sulfur dioxide monitor in the vicinity of Alton's plant recorded two excursions from the primary sulfur dioxide 24-hour standard (two excursions of this standard within one year constitute a violation).

> "The Agency conducted an excursion study to determine the major contributor(s) to the violation. The excursion study determined that Alton's Boilers 6 and 7 appear to have been the major contributors to the violation. Thus, the Agency concluded that Boilers 6 and 7 may cause violations of 35 Ill. Adm. Code 201.141 and 243.122 in the future ***" (Board opinion, petitioner's appendix, p. e-3).

Since the waiver of the permit decision deadline was still in effect because the variance and site-specific rule proceedings were still pending, the Agency did not act immediately to deny the pending renewal application when it determined that Alton was the major contributor to the air quality violation (the Agency did commence an enforcement investigation into the matter which included sending the July 22, 1985 compliance inquiry letter referred to at page 13 of Alton's brief).

On August 1, 1985 the Board dismissed the variance and site-specific rule proceedings for want of prosecution. (*Alton Packaging Corp. v. Pollution Control Board* (1986), 146 Ill. App. 3d 1090, 497 N.E.2d 864.) In the wake of this ruling, Alton did not contact the Agency to request an extension of the permit decision waiver. Thus, on August 27, 1985, the Agency issued its denial of Alton's permit application. The reasons for denial were:

"1. Based upon information submitted to the Agency, Boilers 6 and 7 presently emit sulfur dioxide at the average rate of

4.9 lbs. per million BTU, an amount in excess of the applicable emission limit of 1.8 lbs. per million BTU of 35 Ill. Adm. Code 214.141.

2. The Agency's ambient SO_2 [sulfur dioxide] monitor in Alton recorded a violation of the primary 24-hour SO_2 standard during 1984. Based upon a recent study performed by the Agency, Boilers 6 and 7 appear to have been the major contributor to this violation. Boilers 6 and 7 thus may cause violations of 35 Ill. Adm. Code 201.141 and 243.122(a)(2)." (Board opinion, petitioner's appendix, p. e-2, with corrections.)

The first basis for denial was mooted during the appeal of the dismissal of the variance and site-specific rule proceedings. (Board opinion, petitioner's appendix, p. e-3.)

In the hearing before the Board, Alton mounted a vigorous challenge to the Agency's permit denial decision. By calling key Agency personnel who participated in the permit decision as adverse witnesses, Alton subjected the basis for the Agency's decision to intensive scrutiny. As the Board noted:

> "Alton supports its position by questioning the accuracy of the recorded excursion on November 6 and 7. Alton contends that the November 6 and 7 excursion was not an excursion because the range of accuracy of the monitored readings could range, based on a 95% confidence interval, anywhere from 9% too low to 5% too high. Furthermore, Alton contends that the November 6 and 7 excursion may have been lower since the precision check of the monitor before the recorded excursion indicated that the recorded sample was 5.5% higher than what the real value was. Lastly, Alton contends that the Agency's excursion study was not predictive of the future and, consequently, the Agency could not determine whether the operation of Alton's boilers would in the future cause a violation of the primary SO_2 24-hour standard. (Pet. Brief pp. 7-10)" (Board opinion, petitioner's appendix, pp. e-3 to e-4.)

After reviewing the record developed before the Agency and at the hearing, the Board concluded that:

> "[b]ased on the record before the Agency, the Board finds that the information provided by Alton to the Agency fails to demonstrate that issuing a permit for Alton's mill will not cause a violation of the Act and Board regulations. Therefore, the Board affirms the Agency's denial of a permit for Alton's mill." (Board opinion, petitioner's appendix, p. e-6 to e-7.)

The Fifth District affirmed the Board's decision and the Illinois Supreme Court denied Alton's petition for leave to appeal.

By exercising its right to a hearing before the Board, its prior operating permit remained in effect until the Board had ruled on the appeal (Ill. Rev. Stat. 1987, ch. 127, par. 1016(b)). Alton did not move for a stay of the decision of either the Board or the Fifth District.

SUMMARY OF ARGUMENT

Alton's due process challenge to the denial of its operating permit is both untimely and unfounded. Alton did not raise its due process challenge to the permit denial process until its petition for rehearing before the Fifth District. Alton has, therefore, waived any right to raise this issue before this Court. Furthermore, the mechanism provided by the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1001, *et seq.*) for the review of permit denials provided Alton with all of the process it was due. Alton's petition for writ of certiorari should, therefore, be denied.

ARGUMENT

A. Alton Waived Its Opportunity To Assert Its Due Process Challenge.

Alton did not raise any due process objections to the permit denial mechanism under the Environmental Protection Act until its petition for rehearing before the Fifth District. By failing to raise this objection at the hearing before the Board or in its initial brief to the Fifth District, Alton waived any due process objection it may have had.

Illinois Supreme Court Rule 341(e) (Ill. Rev. Stat. 1987, ch. 110A, Rule 341(e)) governs the content of briefs on appeal and provides that:

"(7) *** Points not argued [in the initial brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

Thus, by not raising its due process objection in its initial brief to the Fifth District, Alton waived that objection. See *Board of Education of Arbor Park School District No. 145, Cook County v. Ballwebber* (1983), 96 Ill. 2d 520, 525, 451 N.E.2d 858, 862; *County of Cook v. Priester* (1976), 62 Ill. 2d 357, 370, 342 N.E.2d 41, 48. Accordingly, Alton's petition should be denied.

B. No Hearing Was Required Before The Agency Because The Agency's Determination Was Only A Preliminary Step And Was Not The Final Agency Action.

It is a fundamental tenet of procedural due process that a hearing is not required at a preliminary stage of an administrative proceeding so long as a hearing is available before the administrative action is final. In this case, the Agency's determination that the permit should be denied is only a preliminary step. Thus, no hearing was required.

1. The permit review process provides ample opportunity for an applicant to make its case and a denial does not become final until the Board issues a decision.

Under the Environmental Protection Act the permit applicant plays a vital role in determining both the scope of the information reviewed in the processing of its application and the scope of the review the application receives. The permit review process commences with the applicant's preparation and submission of the permit application. In addition to the information required by regulation (35 Ill. Adm. Code 201.157 (1985)), the applicant is free to submit all other information it deems necessary to justify issuance of the permit (Ill. Rev. Stat. 1987, ch. 111½, par. 1039(a)). Even though a period of five years may pass between applications, the applicant may (as Alton did in this case) choose to rely on the data submitted with its previous application provided it certifies that it "remains true, correct and current." (35 Ill. Adm. Code 201.157 (1985).)

After submission of the permit application, the Agency commences its evaluation of the application. The Agency reviews the supporting materials submitted by the applicant but also collects and reviews other information relevant to the permit determination. Where the application under review is for the renewal of an existing operating permit, the additional information gathered by the Agency can include information about how the facility has actually performed while in operation, including whether it has been involved in any violations of the Environmental Protection Act.

Section 39(a) of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1039(a)) requires the Agency to complete its investigation and issue its decision within 90 days of the filing of the application. The applicant may, of course, waive this deadline for a specified period or, as was done in this case, until a specific event occurs. When the Agency does issue its decision, if it is denying the application, it must provide the applicant with "specific, detailed statements as to the reason

the permit application was denied." (Ill. Rev. Stat. 1987, ch. 111½, par. 1039(a).) The Environmental Protection Act does not require that the Agency provide the applicant with notice that it intends to issue a decision.

When the Agency has denied a permit, the permit applicant then determines how the matter will proceed from there. The applicant may choose to revise its permit application to address the concerns set forth in the Agency's denial notice and resubmit it. The applicant may also choose to exercise its right to a hearing to challenge the basis for the Agency's decision and petition the Board for a hearing to contest the Agency's decision.

When the applicant elects to proceed before the Board, "it is the Board, not the Agency, which must determine whether a permit should issue." (*Environmental Protection Agency v. Pollution Control Board* (1986), 115 Ill. 2d 65, 68, 503 N.E.2d 343, 344.) Section 40(d) of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1040(d)) limits this hearing to a review of "the record before the Agency." The purpose of this limitation is twofold. First, it protects the integrity of the permit decision by preventing an applicant from circumventing detailed review of a permit application by the Agency through the submission of evidence which, in essence, constitutes a new permit application. Second, it protects the applicant by preventing the Agency from relying on material it did not originally consider in support of its denial decision. As the Fifth District noted, this review is done by "means of cross-examination and the receipt of testimony 'to test the validity of the information [relied on by the Agency]' ***" (citation omitted, *Alton Packaging Corp. v. Pollution Control Board and Environmental Protection Agency* (5th Dist. 1987), 162 Ill. App. 3d 731, 501 N.E.2d 275), petitioner's appendix, p. c-9).

Where an applicant is seeking the renewal of a prior operating permit, the prior permit remains in force until the Board reaches a final decision on the matter. Section 16(b) of the

Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1016(b)) provides that:

> "[W]hen a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of the reviewing court."

This provision of the Administrative Procedure Act applies because the Environmental Protection Act did not address this issue. (*See* Ill. Rev. Stat. 1987, ch. 127, par. 1002(a).) At this stage of the process the applicant may also waive the 90-day decision deadline and take as much time as necessary to prepare its case.

If the permit denial is upheld by the Board, the applicant may move the Board or the appellate court to stay the effect of that decision (35 Ill. Adm. Code 101.140 (1985) and Illinois Supreme Court Rule 335(g) (Ill. Rev. Stat. 1987, ch. 110A, Rule 335(g), respectively).

Under the Environmental Protection Act, an applicant has ample opportunity to both make its own case and to rebut any contrary evidence relied on by the Agency. Due process does not require anymore.

2. No opportunity for a hearing before the Agency was required.

As this Court has stated,

> "[a]t times a preliminary decision by an agency is a step in an administrative proceeding. We have repeatedly held that no hearing is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. See *Lichter v. United States*, 334 U.S. 742, 68 S. Ct. 1294; *Inland Empire Council v. Millis*, 325 U.S. 697, 65 S. Ct. 1316; *Opp Cotton Mills v. Administrator of Wage & Hour Division of Department of Labor*, 312 U.S. 126, 61 S. Ct. 524."

Ewing v. Mytinger & Casselberry, Inc. (1950), 339 U.S. 594, 598, 70 S. Ct. 870, 872. In that case, the court determined that an administrative finding of probable cause that an article had been misbranded in violation of section 304(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334(a)) was only a preliminary step in the initiation of a lawsuit to seize the misbranded articles (this determination of probable cause had been based solely on evidence gathered by the agency itself). Thus, no hearing was required prior to the finding of probable cause because a hearing would be provided prior to the administrative action becoming final.

The Agency determination in this case is just such a preliminary step. As the court noted in *Environmental Protection Agency v. Pollution Control Board* (3rd Dist. 1985), 138 Ill. App. 3d 550, 557, 486 N.E.2d 293, 294,

> "[i]n a permit case, such as this, the process involving the [Agency] and the [Board] is an administrative continuum. It became complete only after the [Board] had ruled."

The Board could issue its ruling only after the applicant has been provided an opportunity for a hearing. At that hearing the Board, unfettered by the prior Agency decision, would review the record developed by the applicant in its application and by the Agency in its review of the application together with such additional evidence and testimony as would be relevant to the applicant's challenge of any contrary evidence relied on by the Agency. *Environmental Protection Agency v. Pollution Control Board, supra,* 138 Ill. App. 3d at 551-52, 486 N.E.2d at 294.

During the pendency of this review, the applicant's prior operating permit would continue in effect. (Ill. Rev. Stat. 1987, ch. 127, par. 1016(b).) For this reason, the present case is distinguishable from the case of *Martell v. Mauzy* (N.D. Ill. 1981), 511 F. Supp. 729. In that case, the Agency had issued Martell a developmental permit for construction of a waste disposal facility. An operating permit would then issue once the applicant's engineer and the Agency certified that the construction permit had been complied with.

> "Since all information required for the operating permit (other than the engineer's certification and the Agency inspection) is submitted with the development permit application, the issuance of a development permit by the Agency was tantamount to the issuance of an operating permit ***."

Martell v. Mauzy, supra, 511 F. Supp. at 733. The Agency, however, denied the operating permit despite satisfactory engineer and Agency certifications, relying instead on information not included in or reviewed under the developmental permit application. The action by the Agency was more in the nature of a permit revocation than a permit denial, because of the unique circumstances involved. "As a result of the denial of the operating permit, [the applicant] has been forced to virtually close its doors." *Martell v. Mauzy, supra*, 511 F. Supp. at 736. In that situation, the court determined that the operating permit should have issued and remained in effect until the applicant had an opportunity to be heard before the Agency was required. In this case, there would be no deprivation because the prior operating permit remained in effect until after Alton could be heard on the Agency's determination.

The Agency's position in the permit process under the Environmental Protection Act is analogous to that of the United States Fish and Wildlife Service ("USFWS") in the case of *Zabel v. Tabb* (5th Cir. 1970), 430 F. 2d 199. That case involved the review of a permit application by the U.S. Army Corps of Engineers ("the Corps") under Section 10 of the River and Harbors Act of 1899 (33 U.S.C. 403). The Fish and Wildlife Coordination Act (16 U.S.C. 661-666) required that the Corps consult with USFWS during the permit process regarding conservation of wildlife resources (16 U.S.C. 662(a)). This consultation then becomes a part of the record upon which the Corps makes its decision. The applicant is then given an opportunity to rebut the USFWS findings and conclusions before the Corps. In the *Zabel* case, USFWS determined that the proposed project would have an adverse impact on wildlife re-

sources. This was one of the factors relied on by the Corps to deny the permit. The court rejected the applicant's assertion that the lack of a hearing before the USFWS violated due process noting that:

> "[a]dministrative law requires that before an agency can regulate a party, it must allow that party to be heard. Here, [the applicants] were given such a hearing before the Corps of Engineers, the body empowered to grant or deny a permit. They were not entitled to a hearing before the Fish and Wildlife Service because it is not 'the one who decides.' *Morgan v. United States* (1935), 289 U.S. 468, 481, 56 S. Ct. 906, 912. They were allowed to rebut the findings and conclusions of the Fish and Wildlife Service before the deciding body and thus were not denied due process for lack of a hearing."

Zabel v. Tabb, supra, 430 F. 2d at 214-15. Alton was given the same opportunity to rebut the findings and conclusions of the Agency "before the deciding body" — the Board. No hearing was required before the Agency.

C. The Opportunity To Rebut The Evidence Developed By The Agency Afforded Alton By The Hearing Before The Board Was Adequate.

Alton has failed to demonstrate that the opportunity given it to rebut the evidence developed by the Agency was so inadequate as to violate due process. Alton asserts that it was not allowed to submit certain evidence (described only as air dispersion modelling studies) which would have rebutted the Agency's evidence because the Board hearing was "limited to the record before the Agency." The record demonstrates that Alton was given ample opportunity to rebut that evidence and took advantage of it. Due process has, therefore, been satisfied.

At the hearing before the Board, Alton sought to rebut the evidence relied on by the Agency by challenging its accuracy. Alton did so by subjecting the Agency employees involved in the gathering of this evidence to extensive questioning and by

submitting both written and oral arguments. (Board opinion, petitioner's appendix, pp. e-3 to e-4.)

At the hearing before the Board, Alton did not object to the statutory limitation of that proceeding to the scrutiny of the record developed before the Agency. In its brief to the Fifth District, Alton noted that:

> "[t]he parties were well aware of this rule and both sides objected when the other side attempted to present information outside of the Agency record." (Alton brief, case #5-86-0477, p. 30.)

It was only in the wake of the Board's decision that Alton determined additional evidence should have been admitted. By waiting until that time to assert additional evidence was relevant, Alton has waived its opportunity to submit that evidence. Furthermore, it is questionable whether any of the subject evidence would be relevant because Alton has not given any indication of how the "air dispersion modelling studies" would rebut any of the evidence relied on by the Agency.

The fact that the Agency acted after Alton's waiver of the decision deadline had expired, without any prior notice to Alton, cannot have prejudiced Alton. Alton asserts that it could not fully prepare its case because the Agency acted on the permit application when it did. This assertion is questionable at best since the Agency acted at exactly the time when action should have been taken — shortly after Alton's waiver of the permit decision deadline had expir ed as a result of the dismissal of variance and site-specific rule proceedings (Board opinion, petitioner's appendix, p. e-3). As with a permit in which the decision deadline has not been waived, the Agency continued to review the application and other relevant information until the time for a decision came — in this case, a time of Alton's own choosing. If Alton felt then that it needed more time to prepare its rebuttal it could have extended the deadline for decision as it had done during the earlier stages of the Agency's review of the application. Alton did not do so. In this light, it is clear that Alton was given ample opportunity to rebut the evidence complied by the Agency. Alton made as much of that opportunity as it then desired. Nothing further is now required.

CONCLUSION

Alton was given all of the process it was due during the review and denial of its permit application by the Agency and the Board. Alton's petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and ILLINOIS POLLUTION CONTROL BOARD

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